IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 1, 2, 4 and 10 5

OLIVER BROWN, ET AL.,
Appellants,
vs.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.,

HARRY BRIGGS, JR., ET AL.,
Appellants,
vs.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL.,
Appellants,
vs.
COUNTY BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,
vs.
ETHEL LOUISE BELTON, ET AL.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF MARYLAND

EDWARD D. E. ROLLINS,
Attorney General of Maryland,
1201 Mathieson Building,
Baltimore, Maryland,

W. GILES PARKER,
Assistant Attorney General of Maryland,

JAMES H. NORRIS, JR.,
Spec. Asst. Attorney General of Maryland.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

Table of Citations

Cases

INDEX TO APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 1, 2, 4 and 10

OLIVER BROWN, ET AL.,
Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL.,
Appellants,

VS.

R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL.,
Appellants,

VS.

COUNTY BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,

VS.

ETHEL LOUISE BELTON, ET AL.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF MARYLAND

I. PRELIMINARY STATEMENT

This amicus curiae brief filed by the Attorney General of Maryland, pursuant to permission granted by this Honor-

able Court, is intended to be exactly what its name imparts, i.e., we shall endeavor, as a friend of the court to assist in the resolution of the questions propounded. The Attorney General is, of course, not intervening in the cause, nor is he authorized to submit the State of Maryland as a party to the instant case. The opinions expressed herein are those of the Attorney General and, of course, do not preclude the Legislature of the State of Maryland, nor the people thereof from taking any action dealing with the segregation problem which may in the future seem desirable to those bodies.

A thorough study has been made for the assistance of the Attorney General by the educational authorities of the State, and our argument must necessarily, to a great degree, be based upon the facts as they exist in the State of Maryland, which a cursory study indicates are not greatly different from those in most of the other States involved, i.e. those States either requiring or permitting segregation, because of color, in public education. The general feeling of the people of Maryland on the subject is substantially similar, although perhaps not as intense as that of the people of the States further South, and the laws of Maryland requiring segregation in education (App. 72, 73) are substantially similar to those of the States from which the cases before the Court have arisen. A more detailed review of the factual situation in our State will be made during the course of argument herein, and, at this point, the Court may be assured that no attempt has been made herein to circumvent or contest the broad principles of law as stated by this Court in its previous opinion in these cases, and the Attorney General, speaking for himself and the State Department of Education at least, assures the Court of the good faith of the State of Maryland in its endeavor to implement this Court's decision.

II. QUESTIONS PRESENTED

Strictly speaking, an amicus curiae should address himself exclusively to the Court's decision in the particular cases at the bar. However, in view of the language of the opinion previously given which, in effect, considers these cases as though they were in form as well as in substance, class actions, this amicus curiae will endeavor to assist the Court in a broader manner than would normally be indicated. The Court has presented for argument questions 4 and 5, previously considered, namely:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> "(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> "5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),
>
> "(a) should this Court formulate decrees in these cases;
>
> "(b) if so, what specific issues should the decrees reach;
>
> "(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
>
> "(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions

should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

We believe that these questions should be resolved in favor of an affirmative answer to Question 4(b), and a further affirmative answer to Question 5(d), with certain reservations and qualifications, which will be suggested in the course of argument.

III. ARGUMENT

1.

This Court May and Should, in the Exercise of its Equity Powers, so Frame its Decree as to Effect an Effective, Gradual Adjustment to be Brought About From Existing Segregated Systems of Public Education to Systems Not Based on Color Distinctions.

There is a plenitude of authority to support the conclusion that this Court (and, for that matter, the court of first instance) has the power to decree an effective, gradual adjustment of the problems involved in the matter of racial segregation in public education.

Undoubtedly, the violation of a legal right, and specifically the violation of the right to equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, is a proper subject for an equitable decree or injunction to enforce the maintenance of that right in the cases before the Court. However, the questions which have arisen are not confined to the rights of the parties to the cases themselves alone, but involve a deep and lasting effect upon a large portion of our nation. For all practical purposes, a new right has been created for the possible benefit of approximately two million children and

their parents, and, as always, with the creation of legal rights, one of the effects is bound to be a limitation of rights or privileges, real or fancied, theretofore enjoyed by others.

The Congress has empowered this Court to grant any remedy which it may find consonant with the public interest, and that of the parties involved. 28 U. S. C. A., 2106 states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, c. 646, 62 Stat. 963.)"

This Honorable Court has shown by its decisions on many occasions the broad and flexible character of its powers in adopting remedies to the circumstances of the case. In *Virginian R. Co. v. System Federation* R. E. D., 300 U. S. 515, at 552, this Court said:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Language particularly applicable to the present situation was used by this Court in *Addison v. Holly Hill Co.*, 322 U. S. 607 at 619, wherein it was said that:

> "Such a disposition is most consonant with justice to all interests in retracing the erroneous course that has been taken."

It has appeared from the Court's previous opinion in these cases that most of the nation has been operating under the erroneous supposition that segregation in public edu-

cation was not a violation of the prohibitions of the 14th Amendment as long as facilities provided for the races were substantially equal, and this Court should make a disposition of the cases consonant with justice to all interests involved in retracing the erroneous course that has been taken. It must be recognized that dangerous consequences could very well follow any other course in this Honorable Court's final decree.

In the case of *Yakus v. United States*, 321 U. S. 414 at 441, 88 L. Ed. 834 at 857, this Court said:

> "But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. Virginian R. Co. v. United States, 272 U. S. 658, 672, 673, 71 L. ed. 463, 471, 47 S. Ct. 222; Petroleum Exploration v. Public Serv. Commission, 304 U. S. 209, 222, 223, 82 L. ed. 1294, 1303, 1304, 58 S. Ct. 834; Dryfoos v. Edwards (D. C.) 284 F. 596, 603, affirmed in 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; see Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 91, 92, 75 L. ed. 221, 233, 51 S. Ct. 1. Compare Wisconsin v. Illinois, 278 U S. 367, 418-421, 73 L. ed. 426, 434-436, 49 S. Ct. 163. This is but another application of the principle, declared in Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 552, 81 L. ed. 789, 802, 57 S. Ct. 592, that 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' "

The abolition of segregation in public education is beyond question a problem of great public interest and undoubtedly a court of equity may grant or withhold its

aid and the manner of moulding its remedies should be influenced by the public interest involved. This is nothing new to courts of equity in the State of Maryland. For example, in the case of *Caretti v. Broring Building Co.*, 150 Md. 198, 132 A. 619, the Court of Appeals of Maryland determined in a case brought to enjoin a nuisance (namely the emptying of sewage into a stream of water flowing through Caretti's land) that since the sudden closing of the system, which admittedly was creating an enjoinable nuisance, might create a serious situation affecting others than the plaintiff and defendant, that the case should be remanded to the lower court with instructions to issue an injunction, *unless within a reasonable time* the Company changed its system in such a way as to avoid injury to Caretti. See also *Baltimore v. Brack*, 175 Md. 615, 3 A. 2d 471. In the case of *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, a suit in equity to enjoin the Tennessee Copper Company from emitting noxious gas over an area in the State of Georgia, this Court held that there is no alternative to the issuance of an injunction *after allowing a reasonable time* to the defendants to complete efforts that they were at that time making to remedy the situation.

Apparently an important factor in all of the cases is the good faith of the defendant in his effort to alleviate the condition complained of by the plaintiff, and the courts under such circumstances have been loathe to use drastic remedies to enforce even obvious rights where such enforcement might cause inconvenience or damage to third parties, or even to the defendant himself.

With reference to the State of Maryland, the Department of Education and the State Law Department, as represented by the Attorney General, have accepted the decision of the Supreme Court and are currently engaged in planning to

take such action as has been indicated is required by law by this Court's previous opinion, and as may be further indicated by the final decree in these cases. See the Report to the State Board of Education and the Attorney General of Maryland by the School Superintendent's Committee (App. 1). See also the Statement of the State Board of Education, May 26, 1954 (App. 17). We will consider below at greater length the current factual situation with respect to public education administration and public opinion in the State of Maryland, but suffice it to say at this time that the good faith of the State cannot be questioned in the premises, and it is respectfully urged, for the above reasons, that the answer to Question 4 should be an affirmative one with respect to 4(b), i.e. that this Court should exercise its existing equity powers to permit an effective, gradual adjustment to be brought about as the most equitable solution of the problem created by the impact of this Court's decision upon established practices and mores. In the words of the Solicitor General of the United States, in an address before the Judicial Conference of the Fourth Circuit, on June 29, 1954:

> "* * * In our system the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder, if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policy-making body might. For example, for several years before taking the School Segregation Cases the Court repeatedly turned away opportunities to decide questions in that area, *perhaps* because they deemed them premature. Lately it declined to review a ruling on segregation in public housing, *perhaps* because the Court thought it best, after deciding the School Cases, not to say more on other aspects of segregation at this time. Or the Court may think the

record in the case at hand not adequate or otherwise unsuitable to raise and decide the point. We can only speculate. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance."

2.

These Cases Should be Remanded to the Courts of First Instance to Frame Decrees in Accordance With the General Principles of Law as Stated by This Court in its Opinion, and Without Specific Directions as to Methods or Time of Compliance, Which Questions Should be Determined by the Courts of First Instance in the Light of Local Conditions as They May be Found to Exist.

It is the contention of this amicus curiae that the cases before the Court should be remanded to the courts of first instance for the framing of decrees in accordance with the general principles of law as stated in the Court's opinion of May 17, 1954, with specific instructions only to frame such decrees so as to permit an effective, gradual adjustment to be brought about. The courts of first instance, in our opinion, should frame their decrees so as to carry out the processes of desegregation as soon as reasonably possible under the conditions which those courts may find to exist in the areas of their jurisdiction.

It is difficult, if not impossible, for us to argue on the facts that exist in the current cases before the Court, and we are only fully acquainted with the facts as they exist in the State of Maryland, which, however, we feel are so analogous to those existing in the States involved in the instant cases that an argument based on the situation as it exists in the State of Maryland would be a valid and compelling one, if otherwise sound. Maryland is a State with a long tradition of the operation of its public schools on a basis of

segregation by race. The State Constitution has provided for the education of both the white and colored races since 1867, and the Maryland statutes, under which the school system operates upon this basis, will be found in the Appendix at pages 72, 73. Maryland has made considerable progress in the education of the Negro, and it is completely true that in Maryland today educational facilities are equal although separate — equal in physical fact and not by law alone or in theory only. As a matter of fact, in some respects, the State of Maryland has shown less discrimination against its Negro students and educators than certain other States in which segregation has been illegal for many years. This shows up particularly with respect to teaching personnel. Maryland, with a population of 2,350,000 has over 2,900 colored school teachers for a non-white population of 388,000; whereas, New Jersey, for example, with a population of 4,835,000, has only 645 colored teachers for a non-white population of 324,000 and Connecticut with a population of over two million has, we are informed, fewer than 100 colored school teachers. Other indications of this situation may be found as referred to in the so-called Ashmore Report, "The Negro and the Schools", The University of North Carolina Press, 1954; which is undoubtedly well known to every member of this Court.

The University of Maryland has been operating on a non-segregated basis in its graduate schools for a number of years, and has recently begun to admit Negroes to its undergraduate courses. The State of Maryland has been spending in excess of $200,000 annually for scholarships for Negroes to out-of-State institutions offering courses which were not available to them at the University of Maryland until this year, and one effect of the Supreme Court's opinion followed by the desegregation of the University has been to

eliminate the granting of any further scholarships of this nature (Statement of Trustee Committee on State Scholarships, July 7, 1954, App. 70). The State further operates Morgan State College, which was designed primarily as an institution of higher learning for Negroes, but which has of recent years admitted white students also who care to attend that institution. So much for the situation with respect to higher education.

In the City of Baltimore, the public school system has begun the process of desegregation with the Fall Term of 1954, and the documents under which such program was instituted will be found in the Appendix at pp. 47 et seq., with, on the whole, a great deal of success, although some difficulties have been encountered.

In the Counties of Maryland outside of the City of Baltimore, the situation is extremely varied. Maryland has been called "America in Miniature", the aptness of which is certainly indicated by the figures on population and school attendance. The Court is respectfully referred to the population map at page 45 in the Appendix, from which, it may readily be seen that the percentage of Negro population varies from practically zero in Garrett County to almost fifty per cent in Calvert County, there being as much difference in this respect between these two Counties as there is between Maine and Mississippi. There are eight Counties with less than ten per cent Negro population; five with from ten to twenty per cent; six with from twenty to thirty per cent; and four with from forty to fifty per cent. Further, the existing public mores, ways of life and established patterns of thinking vary, probably, to a greater degree than the population statistics, although it must be reiterated, in every County substantially physically equal facilities have been provided for Negro students, and in most

of the Counties the facilities provided for the Negro students are superior physically, because newer, than those provided for white children. The tables in our Appendix indicate better than anything we can say the situation with respect to the various problems involved, namely, school population, teaching personnel, school buildings and bus transportation, all of which are factors which must be considered in any survey of the factual situation. It will be seen from a reading of the entire Report to the State Board of Education and the Attorney General of Maryland by the School Superintendent's Committee (App. 1) that the authorities in the field of public education in the State of Maryland are in favor of a peaceful implementation of the Court's decree, whatever form it may take, and they have made what we strongly urge the Court to accept as proper recommendations for the processes of change.

We believe that if left alone to devise in good faith a timetable for the desegregation of every school in Maryland, the local authorities will best be able to solve this problem with the fewest possible ill effects. Unfortunately, all Maryland thinking is not along these lines. Undoubtedly, at the next session of the Maryland Legislature, there will be a deluge of bills and proposals, petitions and propositions, urging everything from the abolition of the school system in its entirety to the election of school teachers by popular vote. The Attorney General of Maryland has received hundreds of letters of varying degrees of literacy upon this subject, all containing suggestions as to what ought to be done.

Two of the more serious attempts to circumvent or defeat this Court's decision are exemplified by two of the inclusions in our Appendix, namely, the so-called "West River Proclamation" (App. 62, 63), which was issued by an

earnest and intelligent group of parents of school children in one of the Counties of Southern Maryland. Another example is the petition which has been circulated by the so-called "Maryland Petition Committee", and which already has thousands of signatures appended thereto. A copy of this may be found in the Appendix at page 63. These two documents illustrate the point of view of what might be called the "upper brackets" of anti-integration. Other suggestions go all the way down the line from the type of action indicated by these two inclusions in our Appendix to outright demand for blood and the reactivation of the Ku Klux Klan. On the other hand, there are those who are in favor of immediate integration and even in favor of the establishment of hard and fast school districts, and the requirement that all pupils must attend a particular school regardless of their or their parents' choice in the matter. This has never been a practice in the State of Maryland, and all children have always had a choice of schools and there has been no arbitrary districting except in cases of serious overcrowding. The above point of view is represented by the data to be found in the Appendix at pages 64 et seq., arising out of a conference of Negro educators at Morgan State College on June 19, 1954. This also earnest and intelligent group has apparently studied the problem carefully but has, as may be seen from the data in the Appendix, reached utterly different conclusions, not only from the anti-integrationists, but also from what may be called the middle view taken by the school authorities in the City of Baltimore, as is indicated by the message of the School Superintendent to Teachers of June 14, 1954, to be found in the Appendix at page 52. We are inclined to urge the latter view as the best authority when coupled with a reasonable time schedule, remembering always that what may be done in one County without perceptible effect, could not be done

in another County at the same time without grave danger of serious public disorder and personal violence.

It has not been difficult to find judicial authority for the proposition stated in the argument above concerning the equity powers of the courts. However, in arguing the second question, we are removing ourselves from the area of the "is" to the area of the "ought to be". We are transporting our argument from the field of law to that of psychology, sociology and public relations. However, it is no new thing to state that this Court should not place itself in the position of attempting to engage in the administration of any public school system. As was said by this very Court in the case of *Minersville School Dist. v. Gobitis,* 310 U. S. 586, 84 L. Ed. 1375, at 1381:

> "* * * But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it."

Just as soon as this Court decrees "an effective, gradual adjustment", the timetable and the methods to be used to accomplish such "an effective, gradual adjustment" become a matter of school administration, and we respectfully urge that this Court, or any court, should only intervene where school administrators on the local level can be shown to have failed to exercise good faith and reasonable diligence to that end. We further believe that the cases before the Court should be remanded to the courts of first instance

with as few specific instructions as possible, except to frame decrees so as to permit the "effective, gradual adjustment", with, of course, a right of review of their actions in such matters by this Honorable Court, if necessary by the continuing supervision of these particular cases. It is further respectfully urged that the courts of first instance, in the cases at bar, and also other nisi prius courts in which similar cases may be pending, or in which similar cases may be filed in the future, be guided by principles substantially similar to those recommended in the Report included in the Appendix at page 10, i.e.:

1. The Courts should enforce the constitutional right of any child to attend the school of his choice within reasonable limits, and this right must not be impaired because of race or color.

2. The Courts should recognize that they are not school boards or administrative bodies at any level. Their function should be judicial and not administrative.

3. The Courts should take into consideration in enforcing the rights of one citizen, or a class of citizens, the possible effect of such enforcement upon the rights of other citizens.

4. The Courts should take into consideration the good faith and intentions of those with a desire to accept the Court's decree and charged with the difficult job of carrying out the process at a level dealing with human minds and bodies and not with abstract principles, however lofty, and these administrators must, therefore, not be hampered by unnecessary restrictions.

5. The Courts should take into account the motives of those who, in the future, may bring actions to enforce the rights established by this Court's decision.

In any event, this amicus curiae and the educational authorities of the State of Maryland stand together in one respect at least, and that is that, under no circumstances should little children of any race be used as guinea pigs in experiments to support or destroy anyone's social theories. The purpose of an educational system is to educate, and there can be no sound reason, in the operation of a sound educational system like that of Maryland, to operate so as to arbitrarily create integration any more than to create segregation. As a matter of fact of which this Court is probably well aware, school segregation has been well on its way out long before this Court acted in the present cases. We cannot express this feeling better than in the words of Harry S. Ashmore in "The Negro and the Schools", at page 135:

> "Finally, there is the hard fact that integration in a meaningful sense cannot be achieved by the mere physical presence of children of two races in a single classroom. No public school is isolated from the community that supports it, and if the very composition of its classes is subject to deep-seated and sustained public disapproval it is hardly likely to foster the spirit of united effort essential to learning. Even those who are dedicated to the proposition that the common good demands the end of segregation in education cannot be unaware that if the transition produces martyrs they will be the young children who must bear the brunt of spiritual conflict."

We do not want spiritual conflict in our school children, nor do we yearn to create martyrs. We do want to preserve public peace and order and, at the same time, continue the excellence of the school system which Maryland has enjoyed for many years, and as was said in the Report

to the Governor of North Carolina by the Institute of Government of the University of North Carolina, at page 38:

> "Law and order is an achievement of men and women and not a gift of the gods. It must be affirmed or lost in every generation."

Good public schools are likewise an achievement and not a gift and it is to preserve these achievements that we respectfully urge the Court that time, understanding and education of the public are necessary to solve the great problem which has been created by the decision in the instant cases, and we, therefore, urge that this Court so frame its decree as to leave the determination of the "how" and the "when" at the lowest possible local level administratively, if possible, and judicially, if necessary.

CONCLUSION

It is, for the reasons stated in the argument, respectfully submitted to the Court by this amicus curiae, that this Court so frame its decree as to answer the questions propounded in the manner in which we have indicated.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General of Maryland,

W. GILES PARKER,
Assistant Attorney General of Maryland,

JAMES H. NORRIS, JR.,
Spec. Asst. Attorney General of Maryland.